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Nos. 94-805, 94-806, 94-988

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GEORGE W. BUSH, Governor of Texas, *et al.*,
and

REV. WILLIAM LAWSON, *et al.*,
and

UNITED STATES OF AMERICA,
Appellants,

v.

AL VERA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas

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BRIEF OF WASHINGTON LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: October 13, 1995

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QUESTIONS PRESENTED

Amici will address the following questions:

I. Whether the direct and circumstantial evidence that Texas was motivated by racial considerations in formulating Congressional Districts ("CDs") 18, 29, and 30, and their contiguous districts, was sufficient to trigger "strict scrutiny" judicial review?

II. Whether Appellants have demonstrated that in drawing CDs 18, 29, and 30 along racial lines, Texas was serving a compelling state interest in a narrowly tailored manner?

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with more than 100,000 supporters nationwide, including many in

Texas. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting the ideal of a color-blind society in which the civil rights of all Americans are equally respected. To that end, WLF has appeared before this Court as well as other state and federal courts in cases raising important civil rights issues. *See, e.g., Miller v. Johnson,* 115 S. Ct. 2475 (1995); *Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097 (1995); *Shaw v. Reno*, 113 S. Ct. 2816 (1993); *Chisom v. Roemer*, 111 S. Ct. 2354 (1991); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995).

The Center for Equal Opportunity (CEO) is a nonprofit educational organization founded in 1987 dedicated to establishing in America a colorblind government in a colorblind society, and, to that end, to protecting the civil rights of all Americans. CEO has appeared before this Court as *amicus curiae* on a number of occasions, including in *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *Shaw v. Reno*, 113 S. Ct. 2816 (1993); and *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared as *amicus curiae* before this Court on a number of occasions.

Amici believe that the people of Texas were ill-served by the congressional districting scheme being challenged in this case. Racial gerrymandering -- by placing the state's

stamp of approval on the notion that people of different races are inherently different from one another -- is a giant step backward from our goal of a color-blind society. Nothing in the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 *et seq.*, requires such gerrymandering. Moreover, experience demonstrates that blacks and Hispanics are fully capable of winning elections in districts that have not been gerrymandered to ensure African-American or Hispanic electoral majorities.

Amici believe that their experience in litigating issues of this sort may prove of assistance to the Court in its consideration of this case. *Amici* submit this brief on behalf of Appellees with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF FACTS

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case contained in Appellees' brief.

In brief, Appellees are residents of Texas who object to the Congressional districting plan adopted by the Texas legislature in August 1991. This appeal focuses on three of Texas's 30 Congressional districts: Congressional Districts ("CD") 18 and 29 in the Harris County/Houston area and CD 30 in the Dallas area. The districting plan was expressly designed so that a majority of the citizens in CDs 18, 29, and 30 are members of racial minority groups (hereinafter referred to as "majority-minority" districts).

Some sort of redistricting scheme had been made necessary by Texas's substantial population growth during

the 1980's, as measured by the 1990 Decennial Census. The growth entitled Texas to 30 seats in the U.S. House of Representatives, whereas it previously had had only 27 seats.

Texas has conceded that, early on in the redistricting process in 1991, the state legislature decided that the three new districts "would all be new minority opportunity districts to be located in the Dallas, Houston, and South Texas areas." Texas's Brief at 4.[1] While a variety of factors played a role in the precise location of the district lines, it is uncontested that Texas never wavered from its objective of creating three new "minority opportunity districts" -- and that, in fact, it obtained its objective.[2]

Blacks have long constituted the largest single racial group in CD 18 in Houston. In every election since 1970,

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[1] The terms "minority opportunity district" and "minority influence district" generally connote districts in which a specified racial minority group may or may not constitute a majority of the population but in which the group nonetheless is expected (due to its voting strength) to have a substantial influence on the outcome of elections. Nonetheless, for ease of understanding, *amici* will use the term "majority-minority district" throughout this brief -- since all three districts at issue in this appeal are, in fact majority-minority. CD 30 (in Dallas) is 50.0% black and 17.1% Hispanic. *See* Appendix to Texas Jurisdictional Statement ("J.S. App.") 27a. CD 18 (in Houston) is 50.9% black and 15.3% Hispanic. J.S. App. 35a. CD 29 (also in Houston) is 60.6% Hispanic and 10.2% black -- albeit among U.S. citizens living in the district, the voting-age population is only 42.5% Hispanic. *Id.*

[2] This appeal involves the constitutionality of two of the three new districts (CD 29 in Houston and CD 30 in Dallas) as well as CD 18 in Houston. The constitutionality of the third new district (CD 28, a Hispanic-majority district in South Texas) is not at issue in this appeal.

CD 18 has elected an African-American to serve as its U.S. Representative. However, CD 18's population became increasingly Hispanic during the 1980s; by 1990, the district's population was 42.2% Hispanic and only 35.1% African-American. J.S. App. 35a. As the United States recognized in its brief, "Throughout the 1980s, blacks and Hispanics had voted together" in Congressional elections in CD 18. Brief for United States at 9. Appellants contend that that coalition "had begun to disintegrate" by 1990 (*id.* at 10), and Hispanic leaders in Houston began pushing for separation of Houston's black and Hispanic communities into separate Congressional districts -- thereby creating "a new Hispanic safe seat in Harris County while preserving the safe African-American seat in District 18." J.S. App. 36a. Leaders in the Texas legislature concurred; and from the beginning of the redistricting process, it was agreed that the population of CD 29 (the new Hispanic-majority district in Houston) would be 60-61% Hispanic. *Id.* at 38a-39a. While non-racial considerations (especially the desire of then-State Senator Gene Green to include as much of his Senate district as possible in CD 29) played a role in the precise location of CD 18's and CD 29's district lines, the legislature's overriding concern was to ensure that CD 29 met its quota for Hispanics and that CD 18 was made majority-black. *Id.*

Prior to 1992, no African-American had been elected to Congress from the Dallas area. The black community in Dallas in 1991 began lobbying the Texas legislature for creation of a black-majority district in Dallas, and the legislature agreed early on in the redistricting process to do so. J.S. App. 28a. While other considerations (particularly the desire of several incumbents in adjacent districts to retain as many reliable Democratic votes as possible

from the black community) played a role in the precise location of the new district's (CD 30's) lines, the legislature's overriding concern was to ensure that CD 30 was majority-black. *Id.* at 63a.

The result of Texas's redistricting process was that CD 18, 29, and 30 are among the most weirdly shaped Congressional districts in the nation. Although each of the three districts is confined to a single metropolitan area (and thus is not geographically large), none of the three qualifies as "compact" under any of the commonly accepted definitions of that term. Indeed, in order to separate Houston's integrated black and Hispanic populations, the legislature was required to resort to breaking apart voter tabulation districts (VTDs) and to redistrict on a block-by-block basis.[3] The highly irregular district lines led to widespread confusion, as voters could not easily determine what districts they lived in.

On November 8, 1991, the U.S. Attorney General notified Texas that he would not object to the state's Congressional districting plan under § 5 of the federal Voting Rights Act, 42 U.S.C. § 1973c. Nonetheless, the letter granting preclearance under § 5 expressed reservations about the plan:

> While we are preclearing this plan under Section 5, the extraordinarily convoluted nature of some districts

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[3] Indeed, as the district court found, the only possible explanation for the decision to split VTDs -- a procedure never employed prior to 1991 -- was to separate voters by race. J.S. App. 26a. That is so because REDAPPL (the computer software used by the legislature in drawing district lines) included no information about residents on the sub-VTD level other than their race/ethnic background. *Id.*

> compels me to disclaim any implication that the proposed plan is otherwise lawful or constitutional.

J.S. App. 8a.

Appellees (six registered voters residing in CDs 18, 25, 29, and 30) filed suit in January 1994 in the United States District Court for the Southern District of Texas. They alleged that Texas's 1991 Congressional districting plan violated their rights under the Equal Protection Clause in that 24 of the state's 30 districts were drawn so as to segregate voters on the basis of race.

Following a trial in June/July 1994, a three-judge court struck down the Texas districting plan with respect to CDs 18, 29, and 30, but rejected Appellees' claims in all other respects. J.S. App. 50a-75a. The court held that CDs 18, 29, and 30 were subject to "strict scrutiny" because an effort to segregate voters by race was the "primary" consideration that went into drawing up lines for those districts. *Id.* at 62a-69a. The court then held that those three districts could not survive "strict scrutiny" because they were not "narrowly tailored" to accomplishing any compelling state interest. *Id.* at 69a-74a. The court held that while compliance with §§ 2 and 5 of the Voting Rights Act constitutes a compelling state interest, CDs 18, 29, and 30 could not be justified on that basis because they were not "narrowly tailored" to that purpose -- because three minority-influence districts could have been established without resort to such extensive, intentional separation of voters by race. *Id.* The court rejected Appellees' claims with respect to 21 other congressional districts, finding "strict scrutiny" was inappropriate because race was not a "significant" factor in drawing lines for those districts. *Id.* at 74a-75a.

On December 23, 1994, this Court stayed the relief granted by the district court. On June 30, 1995, the Court noted probable jurisdiction over each of the three appeals filed from the district court judgment.

SUMMARY OF ARGUMENT

The district court applied the proper standard in determining whether "strict scrutiny" judicial review is applicable in a case challenging congressional reapportionment legislation. Anticipating this Court's decision in *Miller v. Johnson*, 115 S. Ct. 2475 (1995), the district court properly held that strict scrutiny applies when race is the "primary" factor that determined the composition of the three districts at issue. The district court's findings that race was the primary factor in drawing those districts was not clearly erroneous and thus should be upheld.

Texas failed to demonstrate that its adoption of legislation creating CDs 18, 29, and 30 was a narrowly tailored response to any compelling interest of the state. The district court properly declined to apply a "strong basis in evidence" standard, which would make it far too easy for States to justify racial classifications.

Finally, the Court need not be concerned that a decision upholding the district court's decision would open the floodgates on redistricting litigation. The district court's standard is not an easy one for plaintiffs to meet; indeed, in this case, Plaintiffs failed to prevail with respect to 21 of the 24 districts they challenged. Moreover, the district court's decision will not prevent creation of numerous minority districts. Such districts are totally unobjectionable so long as it is not true that "race was the predominant factor motivating the legislature to place a

significant number of voters within or without a particular district." *Id.* at 2488.

ARGUMENT

I. STRICT SCRUTINY IS WARRANTED WHENEVER RACE WAS THE OVERRIDING PREDOMINANT FORCE DETERMINING THE LINES OF A CONGRESSIONAL DISTRICT

A long line of decisions from this Court makes clear that programs that discriminate on the basis of race are highly disfavored under the law. Racial classifications are a "highly suspect tool" that reviewing courts should uphold only under extremely limited circumstances. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 483 (1989) (plurality opinion); *id.* at 520 (Scalia, J.). That is so because, "Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw*, 113 S. Ct. at 2824 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). The Court has also been mindful of the potentially harmful effects of even the most remedial of racial classifications: "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw*, 113 S. Ct. at 2832.

Racial classifications are no less suspect simply because they are employed on behalf of a historically disadvantaged minority group rather than on behalf of the white majority. *Croson*, 488 U.S. at 494 (plurality opinion); *Regents of University of California v. Bakke*, 438 U.S. 265, 295-299 (1978)(Powell, J.). *Shaw* put to rest

any argument that the Court will treat deferentially racial classifications that favor groups that suffered from past discrimination:

> [The dissent] argues that racial gerrymandering poses no constitutional difficulties when district lines are drawn to favor the majority. . . We have made clear, however, that equal protection analysis "is not dependent on the race of those burdened or benefitted by a particular classification." *Croson*, 488 U.S. at 494 (plurality opinion); see also *id.* at 520 (Scalia, concurring in judgment). Accord, *Wygant [v. Jackson Board of Education]*, 476 U.S. [267,] 273 [(1986)] (plurality opinion). Indeed, racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.

Shaw, 113 S. Ct. at 829.

A. Districts Drawn Along Racial Lines Are Not Absolved from Strict Scrutiny Simply Because a State Was Attempting to Comply with the Voting Rights Act

The parties do not seriously dispute that race was the predominant factor in the Texas legislature's decision to draw lines for CDs 18, 29, and 30 as it did. Texas openly admits the legislature's racial motivation throughout its brief. *See, e.g.*, Texas Brief on the Merits at 3 ("the shapes of the districts resulted from" three listed factors, including "the desire to make the districts minority opportunity districts"); *id.* at 3 ("the Legislature drew these districts as opportunity districts in order to comply with the Voting Rights Act"); *id.* at 4 ("the Legislature decided early in the redistricting process that the three additional

congressional seats that Congress reapportioned to Texas after the 1990 census would all be new minority opportunity voting districts to be located in the Dallas, Houston, and South Texas areas.").

In light of this evidence, the district court's decision to apply a "strict scrutiny" standard of review was mandated by the Court's subsequent decision last term in *Miller v. Johnson*, 115 S. Ct. 2475 (1995). The Court held in *Miller* that strict scrutiny will apply to a districting plan whenever the plaintiff can establish that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 115 S. Ct. at 2488. In denying the applicability of "strict scrutiny," Texas and the Lawson Appellants assert that other factors -- particularly a desire to assist incumbents as well as favored state legislators planning to run for open seats -- played a major role in the final configuration of CDs 18, 29, and 30.[4] They are undoubtedly correct that nonracial political considerations played a major role in the precise placement of district lines. But *Miller* nonetheless mandates application of "strict scrutiny" whenever, as here, the overriding concern was to create majority-minority districts and no amount of concern over the need for incumbency protection was going to be allowed to stand in the way of that goal. In order for strict scrutiny to apply, *Miller* requires only that race be the predominant factor in the assignment of "a significant number of voters" to their respective districts, not the factor that explains every district line.

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[4] *Amici* find it telling, however, that Appellant United States has not joined in the challenge to the district court's application of a "strict scrutiny" standard of review.

In any event, the district court's factual finding that race was the "primary" factor that determined the composition of CDs 18, 29, and 30 (J.S. App. 62a-69a) is not clearly erroneous and thus should be upheld on appeal.[5] We cannot understand how those findings can be challenged as "clearly erroneous" in light of the numerous statements by state official (all in the trial record) that CDs 18, 29, and 30 would be drawn so as to ensure election of minority candidates, and in light of Appellants failure to present any plausible explanation (other than a desire to assign voters to districts by race) for Texas's decision to break up VTDs and to redistrict on a block-by-block basis.

Both Texas and the Lawson Appellants argue that assignment of voters to districts on the basis of race should not be deemed racially motivated if the assignments are based on a desire to comply with the Voting Rights Act. The Lawson Appellants argue, for example, that a legislature's "legitimate consideration of race for valid reasons (such as the need to avoid retrogression and fragmentation)" is not evidence that it "acted from predominant racial motives." Brief of Lawson Appellants at 38-39. The Court has repeatedly rejected this argument that there is a "legitimate" category of racial classifications that is not subject to strict scrutiny. *See, e.g., Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2111 (1995) ("any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."). It is only after

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[5] *Miller* held that determinations regarding the predominant motivating factor in district line drawing are factual findings subject to a "clearly erroneous" standard of review. *Miller*, 115 S. Ct. at 2488, 2489.

subjecting a racial classification to the closest possible review that a court can satisfy itself that the classification is as "legitimate" or "benign" as claimed. As the Court explained in *Croson*:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or *simple racial politics*. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.

Croson, 488 U.S. at 493 (emphasis added).

We agree with Texas and the Lawson Defendants that, under appropriate circumstances, separating voters into different districts in order to comply with the Voting Rights Act is permissible under the Equal Protection Clause. However, *Miller* requires that, in every case, such conduct be subjected to the strictest of judicial scrutiny before being deemed "legitimate."

B. The District Court's Standard Will Not Subject Every Redistricting Effort to Exacting Judicial Review

Appellants argue that the standard of review applied by the district court is overly harsh and will subject every legislative redistricting effort to a "strict scrutiny" standard of review. The Lawson Appellants argue, for example, that the district court "erroneous[ly] limit[ed] the non-racial

districting criteria that the State may take into account," and thereby "eviscerated the opportunity afforded the State by this Court's decision in *Miller* to defeat [a racial gerrymander] claim by showing that non-racial considerations were not 'subordinated to race' in the districting process." Brief of Lawson Appellants at 36.

Appellants' assertion that the district court's standard of review will lead to wholesale judicial re-examination of electoral districting plans is belied by the results of this very case. Appellees challenged 24 of Texas's Congressional districts under the Equal Protection Clause; the district court found that only three of those districts should be subjected to "strict scrutiny." With respect to the other 21 districts, the district court found that race had played a role in the drawing of district lines, but that application of strict scrutiny was not warranted because racial considerations were not "proportionately significant" in relation to the district as a whole. J.S. App. 75a. The district court applied strict scrutiny to CDs 18, 29, and 30 only after finding that "race was the primary consideration in the construction of District 30" (J.S. App. 63a) and that "[t]he goal of separating Hispanic and African-American residents from each other and from the white population for purposes of voting led to the creation of" CDs 18 and 29. J.S. App.

67a.[6]

Miller recognized that drawing a "community" into a single electoral district is a valid, race-neutral districting principal, even if the members of such a "community" have "a particular racial makeup." *Miller*, 115 S. Ct. at 2490. But nothing in the district court's decision undercuts a state's ability to bring together such communities of interest. More importantly, there is no evidence in this case that Texas was motivated by a desire to bring together

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[6] Appellants argue repeatedly that a desire to assist incumbents (or to assist favored state legislators who hoped some day to be incumbents) was the predominant factor driving the establishment of district lines in CDs 18, 29, and 30. After engaging in an extensive discussion of the evidence at trial, the district court rejected that interpretation of the legislature's principal motivation. In particular, the district court found that while incumbency protection was an established tradition in Texas redistricting plans, that tradition historically had not been so strong as to overcome other traditional Texas districting principles: creation of reasonably compact districts and respect for political subdivisions. J.S. App. 54a-55a. Moreover, the district court found, a desire to protect incumbents could not begin to explain the highly contorted, VTD-busting district lines drawn for CDs 18, 29, and 30. J.S. App. 59a-60a. At the very least, those findings are not clearly erroneous.

Those findings also refute Appellants' repeated claims that the district court simply ignored their evidence that incumbent protection was Texas's principal motivation in drawing the disputed district lines; while the district court's opinion includes language disparaging incumbent protection as a race-neutral districting principle (such as the warning that incumbent protection "is a valid state interest only to the extent that it is not a pretext for unconstitutional racial gerrymandering" (J.S. App. 59a)), the district court considered all of Appellants' proffered evidence before determining that race was the predominant factor driving the legislature's decision regarding which voters to include in CDs 18, 29, and 30.

any such race-based "communities." Rather, the evidence showed that in Dallas, significant portions of the inner-city black community were excluded from CD 30 and were replaced by distant neighborhoods that were included for the sole purpose of achieving the desired 50%-black population quota. In Houston, racially-integrated communities were split up on a block-by-block basis and assigned to either the 18th or 29th Districts based solely on the predominant skin color on a given block.

It is true that any district drawn along racial lines for the predominant purpose of complying with the Voting Rights Act will be subject to strict scrutiny; but as *Adarand* and *Croson* explain, such scrutiny is wholly warranted. A state that has strong evidence that race-conscious districting is required by the Voting Rights Act and to remedy past discrimination need not fear such scrutiny; states that engage in racial gerrymandering in the absence of such evidence should properly be called to task for their constitutional violations.

Unfortunately, the cycle of redistricting that followed the 1990 census produced a sorry spectacle of racial line-drawing, as was perhaps best illustrated by the facts in *Miller*. Operating under a mistaken interpretation of the Voting Rights Act, the U.S. Department of Justice browbeat numerous states (particularly those subject to § 5 preclearance requirements) into creating the absolute maximum number of majority-minority electoral districts, without regard to traditional districting principles such as compactness. Now that the Court has made clear that the Voting Rights Act contains no such maximization principle (*see, e.g., Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994); and *Growe v. Emison*, 113 S. Ct. 1075 (1993)), and has made clear in *Miller* and *Shaw* that there are strict constitu-

tional limits on race-motivated "remedial" districting, one can expect a sharp decrease in the frequency of race-motivated line drawing in future districting cycles -- and a resulting decrease in the frequency of court challenges.

In sum, the Court need not fear that the standard of review employed by the district court -- a standard of review that is strikingly similar to the standard of review later articulated by this Court in *Miller* -- will lead to wholesale constitutional review of all districting plans. Only in the rare case when, as here, a state discards virtually all traditional districting criteria and makes race/ethnicity the predominant factor in district line drawing will strict scrutiny come into play.

II. TEXAS LACKED A COMPELLING INTEREST SUFFICIENT TO JUSTIFY RACE-MOTIVATED CONGRESSIONAL DISTRICTING

Shaw held that once districting legislation is found to be "unexplainable on grounds other than race," it is subject to "the same close scrutiny" that the Court has given to "other state laws that classify citizens by race." *Shaw*, 113 S. Ct. 2825. Under those circumstances, the legislation is unconstitutional unless the state can demonstrate that its legislation "is narrowly tailored to further a compelling governmental interest." *Id.* at 2832.

Texas contends that it has a compelling interest in complying with the Voting Rights Act and that it adopted its redistricting scheme in order to further that compelling interest. While recognizing that compliance with the Voting Rights Act (to the extent that it is constitutional as applied) constitutes a "compelling" state interest, the district court held that CDs 18, 29, and 30 could not pass

constitutional muster because they are not "narrowly tailored" to achieving the goal of Voting Rights Act compliance. J.S. App. 69a-74a. That conclusion is fully supported by the evidence before the district court and relevant case law.

A. The U.S.'s Efforts to Incorporate the "Strong Basis in Evidence" Standard Into Voting Rights Act Cases Are Misplaced

Appellant United States takes issue not only with the results of the district court's "strict scrutiny" analysis but also with the strictness of that scrutiny. The United States argues that federal courts ought to accord a fair amount of deference to States that attempt to comply with the Voting Rights Act by creating race-driven electoral districts. It argues that a State -- in order to survive "strict scrutiny" -- need not demonstrate by *a preponderance of the evidence* that the State's race-motivated districting plan is required in order to comply with the Voting Rights Act and is narrowly tailored for that purpose; rather, a State need only meet a "strong basis in evidence" evidentiary standard. Brief for the United States at 23-26.

The United States's efforts to import the "strong basis in evidence" standard into this case is wholly misplaced. None of the case law cited by the United States (including *Croson*, *Wygant*, and *Miller*) supports application of that standard in this case. Accordingly, before addressing the merits of Appellants' Voting Rights Act arguments, *amici* will address the United States' efforts to relax the standard of review to which Texas's actions are subjected.

In contrast to this case (in which Texas claims a compelling interest in prospective compliance with the

Voting Rights Act), *Croson* and *Wygant* involved state actors attempting to defend race-based classifications by claiming a "compelling interest" in overcoming the present effects of past race discrimination. *Croson* held that such classifications could be upheld only upon a showing of a "strong basis in evidence" that there existed present effects of past discrimination by the state actor (*Croson*, 488 U.S. at 500) and that the race-based classification was "narrowly tailored" to eliminating such present effects. *Id.* at 507. The considerations that led the Court to adopt the "strong basis in evidence" standard in *Croson* and *Wygant* are inapplicable to this case.

The rationale behind the "strong basis in evidence" standard (a standard which places on defendants an evidentiary burden that is somewhat less than a "preponderance of the evidence" standard) was best explained in Justice O'Connor's concurring opinion in *Wygant*. She explained that to hold a state actor, whose "remedial" racial preference program has been challenged, to a "preponderance of the evidence" standard might discourage States from attempting to eliminate the continuing effects of past unconstitutional racial discrimination -- because any state making such a showing might expose itself to claims from victims of that past discrimination. *Wygant* at 291-92 (O'Connor, J., concurring in part and concurring in the judgment). Thus, a modicum of deference is granted to a state actor's evidence of continuing effects of past discrimination, in order to encourage voluntary race-based remedies where there is strong evidence that such remedies are needed.

That rationale is of no relevance here, where Texas does not claim to be attempting to overcome any continuing

effects of past discrimination.[7] Rather, Texas argues that its new congressional districting scheme is justified by a compelling interest in ensuring that now and in the future it will be in compliance with the Voting Rights Act. Requiring Texas to come forward with evidence to support its claim that it had no choice under the Voting Rights Act but to draw district lines as it did will not expose Texas to new liability claims, since past racial discrimination by Texas is irrelevant to whether the *new* district lines comply with the Voting Rights Act.

More importantly, the district court did not base its decision on a finding that Texas had failed to demonstrate a compelling interest in compliance with the Voting Rights Act. Rather, the court held that CDs 18, 29, and 30 were not narrowly tailored to achieving that compelling interest. *Croson* and *Wygant* did not apply the "strong basis in evidence" standard to the narrowly tailored test -- because requiring a state actor to introduce evidence that its remedial program is narrowly tailored does not expose the state actor to new liability. Rather, *Croson* required state actors to meet their evidentiary burden on the "narrowly tailored" issue by a preponderance of the evidence. *Croson*, 488 U.S. at 507.

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[7] The United States raises an alternative argument that Texas, apart from its interest in complying with the Voting Rights Act, has a compelling interest in eradicating particular instances of racial inequality. Brief for the United States at 32-35. We note merely that the district court declined to consider this argument because "no evidence was presented at trial to support this basis for minority districts." J.S. App. 71a. Inasmuch as this argument was not developed below, the Court should decline to consider it on appeal.

Contrary to the United States' assertion (Brief for the United States at 23), *Miller* did not incorporate the "strong basis in evidence" standard into racial gerrymandering causes of action. *Miller* never addressed the issue. *Miller*'s only mention of that standard came in response to Georgia's argument that it had no choice but to engage in racial gerrymandering in order to obtain § 5 preclearance from the Justice Department. The Court stated:

> We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues. When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied. [Citations omitted.] "The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson, supra,* at 501.

Miller, 115 S. Ct. at 2491. Thus, the Court cited the "strong basis in evidence" standard merely as an example of its unwillingness in past cases to defer to governmental assertions that race-based remedial action is required, not for the purpose of adopting that standard in racial gerrymandering cases.

Indeed, *Miller* explicitly left open the question whether "compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination." *Id.* at 2490-91. In light of the Court's unwillingness to decide that issue,

the United States is surely wrong in citing *Miller* for the proposition that a State survives strict scrutiny in a racial gerrymandering case by demonstrating "a strong basis in evidence" that its districting scheme was required under the Voting Rights Act.[8]

In sum, there can be no justification for permitting a state to make whatever a "strict scrutiny" evidentiary showing entails based on anything less than a preponderance of the evidence.

B. Appellants Have Failed to Demonstrate any Compelling Interest in Taking Remedial Action

Appellants contend that the existence of the Voting Rights Act provided Texas with a compelling interest in drawing CDs 18, 29, and 30 along racial lines. That argument is without merit.

Section 5 of the Voting Rights Act certainly did not *compel* Texas to draw CDs 18, 29, and 30 as it did. As the Court established in *Beer v. United States*, "the purpose of § 5 [of the Voting Rights Act] has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). In other words, § 5 prohibits implementation of a new districting scheme only if the scheme would

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[8] Incredibly, the United States later transforms the "strong basis in evidence" standard to an even less stringent "reasonable basis to believe" standard. Brief for the United States at 23-25. There is simply no good-faith basis for asserting that *Miller* endorses anything even remotely akin to a "reasonable basis to believe" standard.

decrease existing levels of minority voting power. Because there was no Hispanic-majority district in Houston and no black-majority district in Dallas prior to 1991, the failure to create such districts in 1991 would not have violated § 5 -- and thus the decision to create those districts (CDs 29 and 30) cannot be said to have been compelled by § 5. Nor can creation of CD 18 as a majority-black district be justified as necessary to comply with § 5 when, prior to 1991, CD 18 was only 35.1% black.

Nor was Texas's conduct compelled by § 2 of the Voting Rights Act. To establish that a districting scheme violates § 2 by diluting the voting strength of a minority group, a plaintiff must establish three threshold conditions:

> First, "that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; second, "that it is politically cohesive"; and third, "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *[Thornburg v.] Gingles*, 478 U.S. [30], 50-51 [(1986)].

Growe, 113 S. Ct. at 1084.

Had Texas failed to create the three majority-minority districts at issue in this case, it is doubtful that a § 2 plaintiff could have established the first *Gingles* precondition (geographical compactness) in the Houston area. Indeed, even the United States doubts the ability of such a plaintiff to demonstrate that *both* a geographically compact black-majority district *and* a geographically compact Hispanic-majority district could be drawn in the Houston area. Brief for the United States at 28.

Be that as it may, such a plaintiff clearly would not be able to establish the third *Gingles* precondition (white bloc voting enables whites usually to defeat the minority's preferred candidate). The absence of that precondition is most obvious in Houston. Indeed, Texas concedes that blacks and Hispanics in Houston had entered into political coalitions beginning at least in the 1960s that had permitted them to wield considerable political influence. Texas Brief on the Merits at 30. Blacks and Hispanics have joined forces to elect an African-American candidate in CD 18 in every election since 1970. Accordingly, there is simply no basis for contending that white bloc voting in Houston has shut racial minorities out of the political process.

While Appellants complain that the black/Hispanic coalition has begun to break down in recent years, any resulting decrease in black and/or Hispanic political influence could hardly be blamed on white bloc voting when it is within the power of minority groups to re-establish their political influence by re-establishing multi-ethnic coalitions. As the Court made clear in *De Grandy*, "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *De Grandy*, 114 S. Ct. at 2661. In any event, there is no evidence that either African-Americans or Hispanics have been shut out of the political process in Houston in recent years. Indeed, a federal district court in Houston recently found Anglos in Houston do *not* routinely vote as a bloc to defeat Hispanic candidates, and that Hispanics routinely have been represented on the Houston City Council in numbers in excess of their percentage of the city's voting-age citizens. *Campos v. City of Houston*, ___ F. Supp. ___, 1995 WL 478151 (July 31, 1995).

Nor is there strong evidence that blacks have been shut out of the political process in Dallas. Indeed, the Fifth Circuit found in *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 877 (5th Cir. 1993), that minority-preferred judicial candidates in Dallas County are *not* defeated by racial bloc voting.

In sum, Appellants have failed to demonstrate that Texas was forced to engage in racially motivated districting in order to comply with § 2 of the Voting Rights Act.

III. TEXAS'S REDISTRICTING PLAN WAS NOT NARROWLY TAILORED TO FURTHERING ITS INTEREST IN VOTING RIGHTS ACT COMPLIANCE

The Texas redistricting plan must fall for the additional reason that it is not narrowly tailored to serving any compelling interest. Even assuming that the Voting Rights Act could be said to provide Texas with a compelling interest in creating CDs 18, 29, and 30 as minority opportunity districts, those districts as drawn cannot qualify as "narrowly tailored" because of their extremely uncouth shapes.

Appellant United States faults the district court for finding that a election district is not narrowly tailored if it is not compact. The United States argues that once it is shown that the three *Gingles* pre-conditions have been met (including a finding that geographically compacts majority-minority district *could* have been drawn), then a State is not required "to enact a plan that incorporates the geographically compact districts that led it to conclude that Section 2 required it to create minority opportunity districts in the first place." Brief for the United States at 31.

Appellees brief explains ably and at length why the United States' argument is incorrect, and thus *amici* will not repeat that explanation here. Suffice to say that any racially-motivated districting plan can only be justified to the extent that it remedies some wrong -- such as a minority population whose voting rights are being abridged in violation of § 2 as a result of racial block voting. If, as happened here, Texas perceives a § 2 violation among one group of minority voters and then creates a racially gerrymandered majority-minority district among another group of minority voters, then that district cannot qualify as "narrowly tailored" to remedying the violation -- because the district is not a remedy at all. The injury to the minority voters whose § 2 rights were being violated is in no sense ameliorated simply because other minority voters suddenly receive enhanced voter power.

The lack of narrow tailoring in the Texas districting plan is particularly evident in Dallas. If a black plaintiff living in the central-city black community in Dallas could establish a § 2 violation, then a narrowly tailored remedy would entail creating a black opportunity district that encompassed the central-city black community. But CD 30 was not drawn so as to encompass that community. Instead, for a variety of racial and nonracial reasons, significant chunks of that community were left out of CD 30, and CD 30 reached its pre-ordained quota of 50% black residents by extending tentacles to distant African-American neighborhoods far removed from the central city. Thus, while a narrowly tailored minority opportunity district undoubtedly could be drawn in Dallas, CD 30 is not that district.

Finally, *amici* wish to emphasize that the district court's ruling does not preclude the creation of minority

opportunity districts in Dallas and Houston. We would venture to guess that it would be quite difficult to draw a set of compact Texas congressional districts that did not include at least one minority opportunity district in Houston. The Equal Protection Clause provides no impediment whatsoever to taking race into account as one factor among many in drawing up election districts -- so long as it does not become the predominant factor. In light of the broad latitude that *Miller* provides to States in that regard, we would not be at all surprised if blacks ended up with considerable political influence over one of the Dallas districts. What *amici* do find objectionable is the deliberate racial segregation of voters into "separate but equal" voting districts -- such districting practices are antithetical to the Equal Protection Clause and will inevitable lead to a deterioration of racial relations.

CONCLUSION

Amici curiae Washington Legal Foundation, the Center for Equal Opportunity, and the Allied Educational Foundation respectfully request that the Court affirm the decision of the lower court.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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